80-2056

Office-Supreme Court, U.S.
FILED
SEP 9 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term 1981

No. _____

THE F/V AMERICAN EAGLE, ADF&G No. 39 and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 LBS. OF ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NOS. E95626 and E95627,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ALASKA

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Office & Post Office Addresses:

3300 Seattle First National Bank Building
Seattle, Washington 98154
Telephone (206) 623-5890

Suite 201, 311 Franklin Street
Juneau, Alaska 99801
Telephone (907) 586-2210

DOUGLAS M. FRYER of
MORIARTY, MIKKELBORG, BROZ, WELLS & FRYER

WILLIAM B. ROZELL of
FAULKNER, BANFIELD, DOOGAN & HOLMES

Attorneys for Appellants

FRAYN PRINTING COMPANY SEATTLE, WASHINGTON

TABLE OF CONTENTS

Page

Table of Case/Authorities ii

I. ARGUMENT 1

A. The Alaska Supreme Court Has Stated That The Federal Constitutional Issues Raised In This Case Are Substantial And Has Urged Review By This Court 1

B. The Alaska Supreme Court's Decision in *Bundrant* and *American Eagle* On Extraterritorial Jurisdiction Are Contrary To All Other Legal Authority 3

C. The United States Has Indeed Claimed Crab As A Shelf Resource 5

D. The State's Vagueness Argument Fails Even To Mention That Only Registration Areas Were Subject To Closure Under The Regulations And Nowhere Was The Outer Limit Of The Registration Area Defined 6

E. The Absence Of Any Due Process Procedure Compels Claimants To Negotiate Without Any Notice Of Their Rights Or Assurance That Those Rights Will Be Protected 7

II. CONCLUSION 9

III. APPENDICES

TABLES OF AUTHORITY

Table of Cases

Page

Alaska v. Arctic Maid, 366 U.S. 199 (1961) 3

State V. Bundrant, 546 P.2d 530 (Alaska), *appeal dismissed sub nom, Uri v. State*, 429 U.S. 809 (1976) 2, 3, 5

Hjelle v. Brooks, 377 F. Supp. 430 (D. Alaska 1974) 3, 4

Northwest Trollers Association v. Moos, 89 Wn.2d 1, 568 P.2d 793 (1977) 3

People v. Weeren, 163 Cal. Rptr. 255, 607 P.2d 1279 (Cal.), *cert. denied*, U.S. , 66 L.Ed 2d 45 (1980) 4

State v. The F/V Quinhagak, *reprinted in* Appendix H to Appellant's Jurisdiction Statement 6

State v. Sieminski, 556 P.2d 929 (Alaska 1976) 5

Skiriotes v. Florida, 313 U.S. 69 (1941) 3

United States v. Sylvester, 605 F.2d 474 (9th Cir. 1979) 4

Statutes

16 U.S.C. § 1085, Bartlett Act 5

16 U.S.C. §§ 1801-81, Fishery Conservation and Management Act of 1976 4

43 U.S.C. §§ 133-43, Outer Continental Shelf Lands Act (1953) 5

43 U.S.C. §§ 1301-56, Submerged Lands Act 5

AS 16.05.190 7

AS 16.05.195 7

Rules and Regulations

5 AAC 34.005 ..... 6, 7

5 AAC 34.035 ..... 6, 7

5 AAC 34.600 6

5 AAC 34.605(c) 7

5 AAC 34.610 6

5 AAC 39.975 (13) 6, 7

Alaska Court Criminal Rule 1 8

Alaska Court Criminal Rule 37 7

IN THE

Supreme Court of the United States

October Term 1981

No. _____

THE F/V AMERICAN EAGLE, ADF&G NO. 39 and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 LBS. OF ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NOS. E95626 and E95627,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ALASKA

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

ARGUMENT

A. THE ALASKA SUPREME COURT HAS STATED THAT THE FEDERAL CONSTITUTIONAL ISSUES RAISED IN THIS CASE ARE SUBSTANTIAL AND HAS URGED REVIEW BY THIS COURT.

Alaska concedes that the federal constitutional issues in this case were raised in a timely manner but contests their substantiality. The Alaska Supreme Court, in the very decisions at issue, has stated that the issues are substantial and should be reviewed by the United States Supreme Court.

The question of extraterritorial jurisdiction raised in this case was first decided in *State v. Bundrant*, 546 P.2d 530 (Alaska), *appeal dismissed* (for want of jurisdiction) *sub nom*, Uri v. State, 429 U.S. 809 (1976). In its opinion the Alaska Supreme Court stated:

> This court acknowledges its duty not to declare statutes unconstitutional unless such repugnancy clearly appears. We moreover acknowledge that our decision today may provide the most effective vehicle for assuring that this matter will at least receive the prompt and definitive attention by the final arbiters of such questions—the Congress or the Supreme Court of the United States.

546 P.2d at 548. (Footnote omitted.)

On the appeal of *Uri* to this Court the state argued that review should not be granted because the decision below was not final. There was some merit to that argument; upon remand the cases were dismissed because of the impermissible vagueness of the regulations at issue.[1] When the same issues were presented in this case, the Alaska Supreme Court simply reaffirmed its decision in *Bundrant*, 620 P.2d at 663. There is no dispute about finality in this case and the issue of extraterritorial state jurisdiction should now receive the attention of this Court.

In its decision below, the Alaska Supreme Court while disagreeing with the interpretation of the regulations urged by the owners, acknowledged that "the ambiguity in the language employed in the regulations is evident." 620 P.2d at 664, Appendix A to Jurisdictional Statement at A-22. The court stated in the next portion of its opinion:

> The owners of the American Eagle also complain they were denied due process of law in that the forfeiture statutes under which the vessel, gear, and sale proceeds were seized provide for no *in rem* procedure or prompt post-seizure notice

1. *Uri III* (see Appendix G to the Jurisdictional Statement). Those same regulations are at issue here. See Argument III, *infra*.

> and hearing. Given this broad deficiency, the owners, in our opinion, have raised a substantial question whether the statutory scheme on its face affords adequate procedural due process . . .

620 P.2d at 666 (Footnote omitted). Appendix A to Jurisdictional Statement at A-31-32.

Given the express statements on the significance of these issues by the court below, it is difficult to credit the state's argument that they are not substantial.

B. THE ALASKA SUPREME COURT'S DECISIONS IN *BUNDRANT* AND *AMERICAN EAGLE* ON EXTRATERRITORIAL JURISDICTION ARE CONTRARY TO ALL OTHER LEGAL AUTHORITY.

Alaska's decision in *Bundrant* and *American Eagle* asserting jurisdiction over noncitizens outside the state's territorial waters are unsupported by the decisions of this Court or in other jurisdictions. The state has failed to distinguish *Skiriotes v. Florida*, 313 U.S. 69 (1941), and *Alaska v. Arctic Maid*, 366 U.S. 199, 203 (1961), which support appellant's contention that Alaska has no jurisdiction over the activities of the AMERICAN EAGLE outside the jurisdictional waters of Alaska.

The state misunderstands *Northwest Trollers Association v. Moos*, 89 Wn.2d 1, 568 P.2d 793 (1977). The court's decision that Washington's fishing regulations were invalid was based directly on the holding that Washington cannot regulate fishing beyond its three mile limit by Oregon or California citizens.

Alaska is also inaccurate in its description of *Hjelle v. Brooks*, 377 Supp. 430 (D. Alaska 1974). The findings in *Hjelle* are the only judicial findings relevant to this appeal. In that case the three judge court determined that there was no significant crab fishing in Alaska waters, and issued a preliminary injunction prohibiting extraterritorial enforcement of Alaska's regulations, *see* 377 F.

Supp. at 441. The findings in *Hjelle* remain as the only factual determinations by any court on the state's nexus theory.[2]

United States v. Sylvester, 605 F.2d 474 (9th Cir. 1979), is not relevant to this case because Sylvester was convicted for illegal sales within the state. The alleged illegal activity of the AMERICAN EAGLE took place outside Alaska and no landing law is involved.[3]

The state is in error when it asserts that the AMERICAN EAGLE was registered in Alaska. (S.Br. 9.) The AMERICAN EAGLE was registered under federal law at the Port of Seattle as shown by the vessel's Certificate of Registry. (R 570.) While appellant did take out an Alaska fishing license to avoid criminal sanction, that action under compulsion does not constitute consent to extraterritorial jurisdiction. The Fisheries Conservation and Management Act does not expand the power of the states to regulate outside their territory and specifically provides that a state may do so only with respect to vessels registered under its laws. 16 U.S.C. § 1856.[4]

The position of the United States on the issue of Alaska's asserted extraterritorial jurisdiction was presented by the Department of Justice in its *amicus curiae*

2. In *State v. Uri* (*Uri I*) (involving sixteen fishermen) Justice Burke of the Alaska Supreme court (then superior court judge) granted a motion to dismiss the complaints involving fishing more than three miles from shore based on a determination that such regulation would be in conflict with an area of exclusive federal jurisdiction. See Appendix L to Jurisdictional Statement. No factual evidence was presented. In *Bundrant*, which was also dismissed by the trial court, the lone appellant stipulated to certain facts applicable for the purpose of his appeal only.

3. "Landing law" is a term applied to laws that close hunting or fishing throughout a state and prohibit the possession of such fish or game within the state, precluding the defense that contraband was taken outside the state. The discussion of nexus in such cases presents a different issue from the regulation of activity entirely outside the state. *Cf. Hjelle v. Brooks*, *supra*, 377 F. Spp. at 440; *State v. Uri* (*Uri I*), Appendix L to Jurisdictional Statement at A-187.

4. There is dicta in *People v. Weeren*, 163 Cal. Rptr. 255, 607 P.2d 1279 (Cal. 1980), *Cert. denied*, ____ U.S. ___ , 66 L. Ed. 2d 45 (1980), construing registration to include fishing licenses, but that conflicts with a Department of Justice memorandum supporting the view that registration is co-extensive with federal documentation or state ownership registration. See Appendix A to this brief.

brief in *Bundrant*, a copy of which is attached as Appendix B. In its brief the United States stated unequivocally that it asserted exclusive jurisdiction over natural resources of the outer continental shelf, including crab and other living resources of the shelf.[5] The United States also argued that Alaska could not regulate the high seas activities of non-Alaskans. The internal memorandum of Mr. Johnson of NOAA, Appendix F to the State's Motion, does not state the position of the United States.

C. THE UNITED STATES HAS INDEED CLAIMED CRAB AS A SHELF RESOURCE.

The state argues that the OCSLA does not expressly mention king crab as a shelf resource. However, the Federal Government has clearly claimed and defined crab as a living shelf resource in other statutes. These statutes include the Submerged Lands Act,[6] and in particular the Bartlett Act,[7] which applied during the case period but which was replaced in substantially identical text by the FCMA.[8] Alaska presents no argument to these statutes. Its quotation from the OCSLA legislative history that marine life above the land itself was not preempted (Motion to Dismiss, p. 11) does not apply to sedentary species.

5. *See also* the dissenting opinions of Justice Connor in *Bundrant*, 546 P.2d at 559, *State v. Sieminski*, 556 P.2d 929, 935 (Alaska 1976), and in the opinion below. 620 P.2d at 674, Appendix A to Jurisdictional Statement at A-67. Alaska quotes material concerning the Outer Continental Shelf Lands Act purporting to show that crab were not included as shelf resources. As Justice Connor pointed out in his dissent in *Bundrant*, only those species "above the land itself" were excluded from coverage by the OCSLA. 546 P.2d at 561. The federal statutes and treaties cited by Justice Connor and in the briefs expressly include king crab as a shelf resource because they are in constant contact with the shelf, although mobile.

6. "The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, claims, crabs...." 43 U.S.C. § 1301(3). "Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward... all of which natural resources appertain to the United States...." 43 U.S.C. § 1302.

7. "As used in this chapter, the term 'Continental Shelf fishery resource' means... including the following species... king crab." 16 U.S.C. § 1085.

8. "The term 'Continental Shelf fishery resources' means the following... king crab." 16 U.S.C. § 1802.

D. THE STATE'S VAGUENESS ARGUMENT FAILS EVEN TO MENTION THAT ONLY REGISTRATION AREAS WERE SUBJECT TO CLOSURE UNDER THE REGULATIONS AND NOWHERE WAS THE OUTER LIMIT OF THE REGISTRATION AREA DEFINED.

The state's response to the appellants' vagueness argument carefully omits any mention of the words "registration area." This strategic decision to attempt to focus attention elsewhere cannot avoid the critical issues:

1. Only *registration areas* were closed to crab fishing under the regulations—not statistical areas, not districts;[9]

2. Nowhere was the outer boundary of any registration area defined, except by application of the general definition of "waters of Alaska" which extend three miles from shore.[10]

The only geographic area within which a fishing vessel was subject to penal sanction was within the *registration area*. This is discussed in detail in the Jurisdictional Statement at 19-20. Alaska has submitted no response.

The state's brief describes the purpose of the regulations as protecting king crab resources within what it calls the "regulated area"—a term never used in the regulations. (Motion to Dismiss p. 18.) It goes on to say:

> Nowhere is their application restricted to waters inside three miles. On the contrary, the seaward boundary of *Statistical Area 0* is unambiguously defined as 800 fathoms (5 AAC 34.600)

9. *See* 5 AAC 34.005(b), .035 and .610. These regulations as well as the current regulations are reprinted in Appendix C. The current regulations were adopted after the decisions in *State v. Uri* (*Uri III*) and *State v. the F/V Quinhagak* (Appendices G and H to the Jurisdictional Statement) which held the regulations at issue here to be impermissibly vague. The current regulations clearly define the outer limit of the registration areas as three miles from the shore and change the law by making closures and other regulatory provisions applicable to both registration areas and the adjacent seaward biological influence zones (*i.e.*, throughout each statistical area).

Appendix K in the Jurisdictional Statement is unclear because of layout and errors in headings, and Appendix C to this brief should be substituted for it.

10. 5 AAC 39.975(13).

> and the definitions of the Egg Island *District* in 5 AAC 34.605(c) encompasses "all waters of statistical area 0. (Emphasis added.)

Motion to Dismiss p. 19. By slight of hand, the state's argument creates the impression that the entire statistical area was regulated and subject to closure. That is just not so. The statistical area was made up of both a registration area and an adjacent seaward biological influence zone. Only the registration area was subject to closure, and its outer boundary was not defined. As held by the court in *Uri III*, the terms "registration areas" and "statistical areas" are not synonymous. Definition of a statistical area or a district within that area told the appellants nothing about where the registration area ended or where the state's closure regulations applied.[11] Based on 5 AAC 39.975(13) and the case law at the time. (Hjelle v. Brooks and *Uri I*), the only reasonable interpretation was that state regulation ended at the three mile limit. Any ambiguity must be construed against the state. Appellants and similarly situated fishermen cannot be forced to guess at their peril.

E. THE ABSENCE OF ANY DUE PROCESS PROCEDURE COMPELS CLAIMANTS TO NEGOTIATE WITHOUT ANY NOTICE OF THEIR RIGHTS OR ASSURANCE THAT THOSE RIGHTS WILL BE PROTECTED.

It is indisputable that no due process procedure is provided by Alaska statute or rule regarding seizure of vessels or other property. The text of AS 16.05.190 and .195 is all there is.

Alaska's reliance on Criminal Rule 37 is evidence of the void of procedural protection. That argument was not even

11. The terms and definitions at issue here were the same for *all* statistical and registration areas. 5 AAC 34.005 and .035 apply to both area 0 (Egg Island) and area Q (Bering Sea). The State's purported distinction between the two areas ignores the words of the regulations themselves.

advanced by the state until the case was before the Alaska Supreme Court. The criminal rules state on their face that they are applicable only in criminal cases, not civil proceedings such as this one. Criminal Rule 1. Other criminal rules and protections such as the presumption of innocence are not applicable. The state may not, after the fact, permit selective use of criminal rules to patch over defects in its procedures, while never providing any notice to citizens (who must act immediately to protect their property) as to what rules and procedures apply to civil forfeiture proceedings.

The defect in due process in this case is twofold. First, there was no requirement for a prompt hearing. Second, none was granted. The state's brief creates the impression that claimants sought delay. Its assertions in that regard are unsupported in the record, were not presented to the court below, and are without basis in fact. The simple fact is that substantial delay did occur because no procedure was provided to ensure due process and neither side was certain which rules should govern.

The important point is that as long as the rights of claimants remain undefined, the state enjoys excessive negotiating power.[12] If a vessel owner declines to pay the sum demanded by the state to avoid having his vessel seized, a procedure must be agreed upon and a bond must be negotiated. Even then, the terms of an agreed procedure may be subject to argument and a new attorney may seek to renege on an agreement already reached.[13]

12. The State asserts that only five vessels have been seized by Alaska since 1976. Motion to Dismiss p. 22, n.9. This omits the cases where settlements were extracted before physical seizure took place. The absence of any procedure and the great economic cost of lost fishing time compels quick settlements on the state's terms to avoid seizure.

13. The state's effort to reseize the AMERICAN EAGLE after the trial below, even though a bond had been posted, illustrates the risk of proceeding through the ad hoc process that the state here defends.

Due process requires a clear and understandable procedure so that claimants will have notice how to proceed if their property is seized and some statement as to their rights.

The mitigation issue is straightforward: is the shoreside owner of a vessel which is forfeited for a fishing violation to be denied his right to due process merely because his compensation is related to the profits of the vessel? The two owners in this case had no knowledge or involvement in the alleged violations, yet were denied any consideration as to mitigation of penalty simply because their income was related to earnings from a lawful venture.

CONCLUSION

This court should summarily reverse or, in the alternative, accept briefs and argument on the merits.

Dated this 4th day of September, 1981.

DOUGLAS M. FRYER, of Moriarty, Mikkelborg, Broz, Wells & Fryer

WILLIAM B. ROZELL, of Faulkner, Banfield, Doogan & Holmes

Attorneys for Appellants

Appendix A

March 7, 1977

Honorable Les AuCoin
House of Representatives
Washington, D.C. 20515

Dear Congressman AuCoin:

This is in response to your letters of January 6 and February 3, 1977, requesting a Justice Department interpretation of section 306(a) of the Fisheries Management and Conservation Act of 1976 and assistance in drafting language that would bring Oregon's law into conformance with Federal law.

Section 306(a) provides in part that:

> * * * No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

As you have pointed out, the meaning of the term "vessel * * * registered under the laws of such State" is not clear. States do not normally register fishing vessels, and neither the Act nor its legislative history gives any indication of what Congress intended by this language. Since the Department of Justice took no part in its drafting, we are unable to provide any insight into its original purpose.

Nor would any opinion we might give on the subject be conclusive. The language will ultimately have to be interpreted by the courts or amended by Congress to remedy the existing confusion. We believe that amendment of the Act is the preferable solution.

Best Copy Available

It is difficult in the absence of guidance from Congress on this question to discuss possible amendments to section 306(a). However, we would note that existing Federal law may provide a convenient basis for delimiting State authority under the Act. Federal law provides for the documentation and registration of large vessels and numbering under State law of smaller vessels. Vessels that are subject to documentation and registration must designate a home port. It could be said that the State in which a vessel is home ported would have a sufficient nexus to the vessel and its crew to justify the exercise of jurisdiction anticipated in the Act. Presumably, that nexus would be even stronger in relation to smaller vessels numbered under State law. Moreover, an amendment incorporating this concept would obviate the need for changes in State law. If Congress determines that a clarification of this nature is desirable, the following amendment to section 306(a) would accomplish that purpose:

> * * * No State may directly or indirectly regulate any fishing vessel outside its boundaries, unless such vessel is documented, licensed or enrolled under Federal law and has its home port in the State or is numbered by that State pursuant to section 17 of the Federal Boat Safety Act of 1971 (85 Stat. 220).

Sincerely,

Anthony C. Liotta
Acting Assistant Attorney General
Land and Natural Resources Division

Best Copy Available

Appendix B

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant v. CHARLES BUNDRANT, Appellee	File No. 2295
STATE OF ALASKA Appellant v. KONRAD S. URI, et. al., Appellees	File No. 2435
STATE OF ALSAKA, Appellant v. CORY A. KALDESTAD, Appellee	File No. 2444

Appeal from the Superior Court
of the State of Alaska, Third Judicial District

BRIEF OF THE UNITED STATES
AS AMICUS CURIAE

INDEX

	Page
The interest of the United States	2
Statement of issues	3
Summary of argument	3
Argument:	
I. The United States has claimed the exclusive right to resources of the outer continental shelf since September 28, 1945	4
II. The State of Alaska may not regulate the high seas activities of non-Alaskans	10
A. Alaska's jurisdiction over resources of the continental shelf does not extend to the limits of federal jurisdiction	12
B. Alaska's "Political Sovereignty" over the resources of the sea does not extend beyond the limits of her Submerged Lands Act grant	14
C. Alaska may not assert jurisdiction over the extraterritorial conduct of non-Alaskans	17
Conclusion	21

CITATIONS

Cases:

Alaska v. Arctic Maid, 366 U.S. 199	19, 20
Hjelle v. Brooks, 377 F.Supp. 430	16, 17, 20
Manchester v. Massachusetts, 139 U.S. 240	14, 15, 16, 19
Skiriotes v. Florida, 313 U.S. 69	17, 18, 19
Toomer v. Witsell, 334 U.S. 385	14, 16
United States v. Bevans, 3 Wheat. 336	15
United States v. California, 332 U.S. 19	11, 13, 15
United States v. Florida, 363 U.S. 121	18
United States v. Louisiana, 339 U.S. 699	6
United States v. Louisiana, 363 U.S. 1	6
United States v. Maine, et al., 43 L.W. 4359	13

Page

United States v. Ray, 423 F.2d 16 . . . . . 8, 9
United States v. Texas, 339 U.S. 707 . . . . . 6, 7

Statutes and Treaties:

Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331 5
Proclamation No. 2667, 58 Stat. 884 5
Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301-1315 7
Sec. 2(e) 7
43 U.S.C. 1301(2) (b) 13
43 U.S.C. 1301(2) (c) 14
78 Stat. 194, 16 U.S.C. 1081 . . . . . 5, 9, 11
Convention on the Continental Shelf, 15 U.S.T. 471 . . . . . 5, 8, 13
Article 2(4) 9
Article 3 9
U.S./Japan Agreement regarding the King and Tanner Crab Fisheries in the Eastern Bering Sea, T. I.A.S. 7986. 11
U.S./USSR Agreement Relating to Fishing for King Crab, T.I.A.S. 7515 11

Miscellaneous:

Statement of Philip B. Perlman, Solicitor General of the United States, March 28, 1951, Submerged Lands Hearings before the Committee on Interior and Insular Affairs, U.S. Senate. 82d Cong., 1st sess., on S.J. Res. 20, p. 376. 7
Yearbook of the International Law Commission (1956) Vol. 1, p. 143 9
50 C.F.R. 295. 11

THE INTEREST OF THE UNITED STATES

The case involves an assertion of criminal jurisdiction by the State of Alaska over the taking of king crab on the high seas of the Bering Sea. Defendants are charged with violating Alaskan regulations by engaging in activities which are said to have taken place at least 16 miles from the coast of Alaska. The United States is interested both in the resources of the continental shelf over which the State has attempted to assert control and the assertions of police power jurisdiction by the State seaward of the territorial sea. The Superior Court for the State of Alaska, Third Judicial District, dismissed the complaints.

The decision of the court below is predicated on its conclusion that the Federal Government has claimed exclusive jurisdiction over the resources of the outer continental shelf. The United States agrees with that conclusion. However, we understand that the State of Alaska disagrees, at least as to the kind of resources over which a federal claim has been made, and that absent a federal claim the State claims extensive extraterritorial authority over the crab fishery of the outer continental shelf. The purpose of this brief is to advise the Court that the Federal Government does claim exclusive federal jurisdiction over natural resources of the outer continental shelf, including king crab, and to state the position of the Federal Government on the question of Alaska's authority to assert extraterritorial jurisdiction over non-Alaskans.

STATEMENT OF ISSUES

1. Whether the Federal Government has claimed exclusive jurisdiction over natural resources of the outer continental shelf.

2. Whether, in the absence of an exclusive federal claim to the living resources of the outer continental shelf the State of Alaska may assert jurisdiction over the activities of non-Alaskans on the high seas.

SUMMARY OF ARGUMENT

1. The Federal Government has asserted exclusive jurisdiction over natural resources of the outer continental shelf since 1945. This claim applies to both mineral and living resources of the outer continental shelf, and has been recognized by international agreement, domestic litigation and federal legislation. The claim has been asserted vis a vis other nations and recognized in international law, as evidenced by the Convention on the Continental Shelf. It has also been asserted vis a vis the adjacent coastal states of the United States, as evidenced by the "tidelands" litigation and the Outer Continental Shelf Lands Act.

2. The State of Alaska may not normally assert jurisdiction over non-citizens on the high seas. Beyond the territorial sea the State may only exercise police power over its own citizens engaged in activities in which the State has a legitimate interest. The State has no jurisdiction over the activities of non-citizens on the high seas.

ARGUMENT

I

THE UNITED STATES HAS CLAIMED THE EXCLUSIVE RIGHT TO RESOURCES OF THE OUTER CONTINENTAL SHELF SINCE SEPTEMBER 28, 1945

The history of the United States claim to resources of the outer continental shelf is well known and would seem to be beyond dispute. On September 28, 1945, President Truman issued his now famous proclamation stating that "the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." Proclamation

No. 2667 (58 Stat. 884). This claim was implemented by Congress in 1953 through the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331. In 1958 the community of nations codified international law on the subject in the Convention on the Continental Shelf, 15 U.S.T. 471 which recognized the exclusive rights of coastal nations over natural resources of their adjacent continental shelves for the purpose of exploration and exploitation. The Convention came into force June 10, 1964. Later in 1964 sanctions were provided against foreigners who wrongfully harvest the resources of our continental shelf, 78 Stat. 194, 16 U.S.C. 1081.

Apparently Alaska is taking the position in this litigation that although the United States has clearly claimed exclusive rights to living resources of the continental shelf internationally, neither the tidelands litigation nor the Outer Continental Shelf Lands Act makes an exclusive claim to these resources vis a vis the coastal States. In fact no court decision,[1] legislation, or international claim distinguished between living and non-living resources of the shelf. In pre-Submerged Lands Act litigation the Supreme Court stated that the United States has paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the ocean seaward of the low-water line. United States v. Louisiana, 339 U.S. 699; United States v. Texas, 339 U.S. 707.

The early tidelands litigation, like the Truman Proclamation before it, may have been precipitated by the presence of offshore oil but the broad language of these decrees was no coincidence. In the first Texas case the Court remarked that: "Today the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself. If the property, whatever it might be, lies seaward of the low-water mark, its use, disposition, management and control involve national interests and national responsibilities.

1 The more important of these cases are completely and accurately discussed in Brief of Appellees, pages 8-13, and we will not review them here.

That is the source of the national rights in it." 339 U.S. 707, 719. The Supreme Court was explicitly recognizing the exclusive federal right to all continental shelf resources.

In testimony preceding passage of the Submerged Lands Act Congress was reminded that:

> The Court has three times held that the Federal Government has full dominion and imperium over the submerged land and its resources, as against the States, and that it is possessed of whatever is the most accurate description of the full power and right to take and enjoy the complete benefit of the mineral and other resources of the bed of the sea. Statement of Philip B. Perlman, Solicitor General of the United States, March 28, 1951, Submerged Lands Hearings before the Committee on Interior and Insular Affairs, U.S. Senate, 82d Cong., 1st sess., on S.J. Res. 20, p. 376.

Congress then, through the Submerged Lands Act, expressly granted to the States exclusive rights to natural resources in the territorial sea. The resources involved are listed in section 2(e) of that Act and include both living and non-living resources.

The Outer Continental Shelf Lands Act just as clearly preserved the already established exclusive federal rights beyond the limits of that grant. In United States v. Ray, the Fifth Circuit Court of Appeals upheld the trial court's finding that coral reefs more than 3 miles off the coast of Florida "are 'natural' resources within the Outer Continental Shelf Lands Act," 423 F.2d 16, 19. The lower court had concluded that "whatever proprietary interest exists with respect to those reefs belongs to the United States under both national and international law."

Even prior to the Convention on the Continental Shelf, the United States made clear to the world that the Outer Continental Shelf Lands Act claimed living resources of the shelf for the United States. A common topic of discussion in the International law Commission, the United Nations body designated to prepare the draft articles which later became the Continental Shelf Convention, was what living resources of the continental shelf came within national

shelf came within national jurisdiction. During discussions of the Commission, Mr. Edmonds, the United States delegate, stated that "The United States had repeatedly maintained that the living natural resources of the subsoil and seabed, as covered by that legislation [the Outer Continental Shelf Lands Act] included only those in attached forms, which was confirmed in a subsequent section." Yearbook of the International Law Commission (1956) Vol. 1, p. 143.

The Convention ultimately adopted this position, using slightly different language in Article 2(4).[2] The Court in United States v. Ray recognized that the Convention had merely "confirmed and crystallized" the already existing rights in the natural resources of the continental shelf. 423 F.2d 16, 21.[3]

King crab, like coral, is a living resource of the shelf. President Truman claimed "natural resources" for the United States in 1945. The Supreme Court held on a number of occasions that the Federal Government rather than the States had

---

2 "The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."

3 The State of California, in its brief Amicus Curiae in this litgation, notes that the Outer Continental Shelf Lands Act did not restrict the long recognized right of freedom to "fish" on the high seas. Neither, of course, did the Continental Shelf Convention. However, it is clear that each document referred to the taking of free swimming fish, not creatures of the shelf. Taking continental shelf resources, which the Act and the Convention recognized as belonging to the coastal nation, is not "fishing" within the meaning of either. To find otherwise would be to conclude that the Continental Shelf Convention and 16 U.S.C. 1081, which prohibits foreigners from taking crab from our continental shelf, are inconsistent with Article 3 of the Continental Shelf Convention and Article 2(2) of the High Seas Conventions, which acknowledge the freedom to fish on the high seas. They are not inconsistent. There is no freedom to "fish" for crab, coral or oil for that matter on another nation's continental shelf.

jurisdiction over such resources beneath the seas. Congress granted to the States authority over the resources to the limits of the territorial sea but at the same time reaffirmed federal jurisdiction beyond. And that exclusive federal right beyond the territorial sea has been recognized by the courts with respect to both mineral and living resources of the outer continental shelf.

II

THE STATE OF ALASKA MAY NOT REGULATE THE HIGH SEAS ACTIVITIES OF NON-ALASKANS

Assuming for the moment that the United States had not claimed exclusive jurisdiction over the living resources of the outer continental shelf, Alaska apparently claims authority to regulate the crab fishery on the high seas regardless of the citizenship of the fishermen involved. This the State cannot do. In the very first dispute between the Federal Government and California over offshore jurisdiction, the Supreme Court recognized that:

> * * * whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the States do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or other international obligations. United States v. California, 332 U.S. 19, 35.

The present state regulatory system presents the very potential for international conflict of which the Supreme Court warned. Although the defendants here are American citizens there does not appear to be anything in the Alaska statute or regulations which would prevent their application against non-Americans. Indeed, Alaska's theories of jurisdiction over the

crab "fishery" on the high seas, although not always entirely clear, would seem to apply equally to non-Americans as they have been applied to citizens of Washington. This is indeed what the Supreme Court described as "a subject upon which the nation may enter into and assume treaty or other international obligations," as has been done with the Soviet Union and Japan in the Bering Sea.[4] As an exercise of its exclusive jurisdiction, the United States has also enacted a general prohibition against foreign exploitation of our shelf resources, 82 Stat. 445, 16 U.S.C. 1081, and specifically included king crab among the protected resources. 16 U.S.C. 1085 and 50 C.F.R. 295.

Alaska simply lacks jurisdiction over the activities of foreigners beyond her borders. In an attempt to justify her assertions of jurisdiction in this instance the State relies on three separate contentions. First that State jurisdiction extends to the limits of national jurisdiction. Next that a State may extend its political sovereignty beyond her nomral boundaries. And finally that the State may assert personal jurisdiction over non-citizens even beyond her boundaries. None of the authorities cited by Alaska supports these contentions.

A. Alaska's jurisdiction over resources of the continental shelf does not extend to the limits of federal jurisdiction. – Although the State asserts that its jurisdiction over the shelf extends to the limits of federal jurisdiction the State appears to place little reliance on this theory and properly so.[5] The Supreme Court has often faced this issue in 30 years of litigation between the United States and the coastal States and has without exception rules that the only rights of the States over the resources of the continental shelf are derived from the Submerged Lands Act grant from Congress. Prior to that grant the States had no rights to these resources. United States v. California, 332 U.S. 19; United States v. Maine, et al., 43 L.W. 4359.

4 U.S./USSR Agreement Relating to Fishing for King Crab, T.I.A.S. 7515; U.S./Japan Agreement regarding the King and Tanner Crab Fisheries in the Eastern Bering Sea, T.I.A.S. 7986.

5 Alaska's Memorandum in Support Opposition to Motion to Dismiss and to Suppress, in Superior Court for State of Alaska, pp. 18-19.

Under the Act the States were granted certain rights expressly limited to the 3-mile marginal sea.[6] Supra, pp. 7 to 10.

Rights of the United States to resources of the outer continental shelf are based on international law. The Convention on the Continental Shelf, 15 U.S.T. 473, codified the international law on this subject, recognizing the exclusive rights of coastal nations to the natural resources of their adjacent continental shelves for the purpose of exploration and exploitation. Political subdivisions of coastal nations are not the subjects of international law and gain nothing from this Convention unless domestic law further distributes the rights. The United States has done this only through the Submerged Lands Act which limits Alaska's jurisdiction to an area measured 3 miles from the low-water line and closing lines across the mouths of inland waters. 43 U.S.C. 1301(2) (c).

B. Alaska's "Political Sovereignty" over the resources of the sea does not extend beyond the limits of her Submerged Lands Act grant. – Alaska appears to rely heavily on Manchester v. Massachusetts, 139 U.S. 240, and Toomer v. Witsell, 334 U.S. 385, to support an argument that a State may unilaterally extend its boundaries to regulate offshore fisheries. Neither case supports such a proposition.

In Manchester the defendant, a citizen of Rhode Island, was arrested for fishing within 1.25 miles of the Massachusetts shore in Buzzards Bay. The Bay, having a mouth of less than 6 nautical miles, is clearly part of the inland water of the United States. The sole concern of the Court was whether a State had jurisdiction over any fisheries activities in a tidal area seaward of the low-water mark and it concluded that, "the subject (fishing) is one which a State may well be permitted to regulate within its territory, in the absence of any regulation by the United States." 139 U.S. 240, 265.

The effect of Manchester was the finding that Buzzards Bay, part of the inland waters of the United States, was also

---

6 With the exception of Gulf Coast States which were given an opportunity to prove historic boundaries of up to 3 leagues. 43 U.S.C. 1301(2) (b).

part of Massachusetts. The Court noted, quoting from United States v. Bevans, 3 Wheat. 336, that, "The jurisdiction of a State is coextensive with its territory; coextensive with its legislative power." 139 U.S. 240, 263. According to the Supreme Court in United States v. California, 332 U.S. 19, "the illegal fishing charged was in Buzzards Bay, found to be within Massachusetts territory, and no question whatever was raised or decided as to title or paramount rights in the open sea." 332 U.S. 19, 37.

Toomer v. Witsell presents a similar problem in which the Court recognized an extension of state jurisdiction beyond that treated in Manchester, that is inland waters, to the limit of the territorial sea. The State of South Carolina had enacted regulations governing the taking of shrimp within 3 miles of its coast. Fishermen from Georgia sought to enjoin enforcement of those regulations against them. A three-judge federal court sustained the State's regulations and the Supreme Court affirmed, holding that:

> Since the present case evinces no conflict between South Carolina's regulatory scheme and any assertion of federal power, the District Court properly concluded that the State has sufficient interests in the shrimp fishery within three miles of its coast so that it may exercise its police power to protect and regulate that fishery. 334 U.S. 385, 393.

Throughout the opinion in Toomer v. Witsell, the Supreme Court was careful to emphasize that the regulations applied only within the 3-mile limit, only within the undisputed territory of South Carolina. There is absolutely no basis for relying on either the Manchester or Toomer cases to support an attempted extension of state jurisdiction beyond the territorial sea.

Of course Alaska may not unilaterally extend her seaward boundaries as described in her Act of Admission, 72 Stat. 339, and the three-judge federal court in Hjelle v. Brooks found that the State has not done so. 377 F.Supp. 430, 440, That Court concluded that the regulations which it was

considering could be distinguished from proper landing laws because they attempted to control the taking of crab throughout the entire Bering Sea, thereby having a "direct impact on extra-territorial conduct. 377 F.Supp. at 441. The regulations have since been amended but their objectional effect remains. The State still seeks to control activities beyond its boundaries. This it cannot do except in the limited circumstances which we will now discuss involving citizens of that State engaged in activities within which the State has a legitimate interest and with respect to which there will be no conflict with an Act of Congress.

C. Alaska may not assert jurisdiction over the extra-territorial conduct of non-Alaskans. – As a final fallback position Alaska contends that she may assert jurisdiction over non-citizens of the State even beyond her territorial boundaries. This she clearly may not do unless the facts fit within one very limited exception. See page 20, infra. In this argument the State relies on the Supreme Court's decision in Skiriotes v. Florida, 313 U.S. 69, upholding the conviction of a sponge fisherman for violating Florida regulations by using diving gear to harvest sponges in the Gulf of Mexico. There was some question in the case as to whether the violation, which occurred 6 miles off-shore, was within the waters of Florida.[7] However, the Supreme Court based its decision solely on the citizenship of the defendant. A government may assert jurisdiction over its own citizens even beyond its territory. According to the Supreme Court in its Skiriotes opinion:

> * * * the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries where the rights of other nations or their nationals are not infringed * * * [this authority is based upon] the duty of the citizen in relation to his own government. 313 U.S. 69, 73.

7 Florida is one of the States for which Congress had approved a 9-nautical mile boundary in the Gulf of Mexico. United States v. Florida, 363 U.S. 121.

Later the Court explained that the same principle could be applied to the relationship between a State and its citizens, saying:

> * * * If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is not conflict with Acts of Congress. 313 U.S. 69, 77.

The Court specifically recognized that no interest of the United States or citizens of another State was involved, confirming that:

> * * * no question as to the authority of the United States over these waters or over the sponge fishery, is here involved. No right of a citzien of any other state is here asserted. The question is solely between appellant and his own State. 313 U.S. 69, 76.

The Court noted the distinction between this case and Manchester v. Massachusetts in which Massachusetts was permitted to regulate the activities of a Rhode Island citizen because he was within the boundaries of Massachusetts. Since the activities involved in the present litigation took place beyond the limits of Alaska, Manchester provides no precedent for the principle sought to be established, nor does Skiriotes with respect to any defendant who is not a citizen of Alaska.

More in point is Alaska v. Arctic Maid, 366 U.S. 199, in which the State attempted to tax the operations of salmon freezer boats operating within Bristol Bay but more than 3 miles from shore. The defendants were citizens of Washington and California. The State's interests were, of course, much the same as they are in this case. Salmon is an important resource of the Bering Sea and the Alaskan economy has long been influenced by it. Nevertheless, the Supreme Court concluded that "If the fish were taken or purchased outside Alaska's territorial waters, all of respondents' business in the Bristol Bay area

would be beyond Alaska's reach." 366 U.S. 199, 203. The instant case presents a similar situation.

Also in point is Hjelle v. Brooks in which a three-judge federal court enjoined the enforcement of Alaskan regulations designed to control crabbing in the Bering Sea. After reviewing a number of cases dealing with state conservation laws the Court concluded that to be constitutional a state regulation must be directed toward conserving a resource within the state. If so directed a regulation might have an indirect impact on extraterritorial conduct and yet be Constitutional. Typical of such regulations are landing laws administered to facilitate enforcement of conservation schemes for resources within the state. Such regulations may be enforced against non-citizens found within state boundaries. 377 F.Supp. 441.

At the other end of the spectrum are regulations having a direct impact on extraterritorial conduct. The Hjelle Court found that the Alaskan regulations which it was considering were concerned with conserving crab in the entire Bering Sea as well as within Alaskan territorial waters. Such a scheme could not withstand Constitutional attack. Alaska's revised regulations, with which we are concerned here, suffer from the same affirmity. They appear to seek to control extraterritorial conduct with little or no pretense of protecting an in state resource.

CONCLUSION

For the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted,

WALLACE H. JOHNSON,
Assistant Attorney General.

BRUCE C. RASHKOW,
MICHAEL W. REED,
Attorneys, Department of Justice,
Washington, D.C. 20530.

CERTIFICATE OF SERVICE

I certify that the foregoing Motion for Leave to File Brief Amicus Curiae and Participate in Oral Argument, Memorandum in Support of Motion, and Brief Amicus Curiae have been served on the Attorneys General of Alaska and California and counsel for defendants by placing copies of the same in the United States mail, postage prepaid, properly addressed to Mr. Roderick Walston, Deputy Attorney General, 6000 State Building, San Francisco, California 94102; Mr. Gerald Markham, Assistant Attorney General, 360 K Street, Anchorage, Alaska 99501; Mr. David B. Ruskin, Post Office Box 2073, Anchorage, Alaska 99501; Mr. Douglas Fryer, 3300 Seattle First National Bank Building, Seattle, Washington 98154; Mr. William B. Rozell, 311 Franklin Street, Suite 201, Juneau, Alaska 99801 on this 25th day of April, 1975.

Michael W. Reed
Attorney, Department of Justice
Washington, D.C. 20530

REGULATIONS ADOPTED AFTER EARLIER REGULATIONS APPLIED TO THE AMERICAN EAGLE WERE DECLARED IMPERMISSIBLY VAGUE IN URL
(Emphasis added.)

5AAC 34.005

(b) Each statistical area consists of

(1) a registration area, comprised of all the waters within the statistical area which are territorial waters of Alaska; and

(2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting the registration area. However, regulations governing the registration area will also be applied in the adjacent seaward biological influence zone consistent with sec. 10 of this chapter.

5AAC 34.010. APPLICATION OF REGULATIONS.

(a) Notwithstanding any other provision of this chapter, all regulations in this chapter applicable to a registration area shall be applicable also in its adjacent seaward biological influence zone.

REGULATIONS APPLICABLE TO THE AMERICAN EAGLE
(Emphasis added.)

5 AAC 34.005

(b) Each statistical area consists of:

(1) a registration area comprised of all the waters within the statistical area which are waters subject to the jurisdiction of the state; and

(2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting waters subject to the jurisdiction of the state.

5 AAC 34.010 - [No such regulation in 1976.]

Appendix C

(b) Persons on a vessel navigating within an adjacent seaward biological influence zone shall conduct their operations and activities in full compliance with the regulations applicable to the appurtenant registration area.

(c) The commissioner may suspend the application of this section wholly or partially in any seaward biological influence zone if he finds that such application:

(1) does not tend to facilitate enforcement of regulations applicable to a registration area;

(2) does not tend to protect or conserve king crab inhabiting territorial waters of Alaska; or

(3) that the state has an insufficient interest in the king crab inhabiting the zone to warrant extension of the jurisdiction of the state to the zone.

5 AAC 34.035. CLOSURE OF REGISTRATION AREAS.

(a) The commissioner shall monitor the condition of king crab stocks in all statistical areas through use of such data and information as are practically available.

(b) When the commissioner finds that continued fishing effort would jeopardize the viability of king crab within a registration area, he shall close the registration area by emergency order. . . .

(f) The foregoing provisions of this section area applicable also to closures of district, subdistricts, sections, or any other portion of a statistical area.

5 AAC 34.035. CLOSURE OF REGISTRATION AREAS.

(a) The commissioner shall monitor the condition of king crab stocks in all statistical areas through use of such data and information as are practically available.

(b) When the commissioner finds that continued fishing effort would jeopardize the viability of king crab within a registration area, he shall close the registration area by emergency order. . . .

(f) [No subsection in 1976.]

5 AAC 34.091. UNLAWFUL ACTS WITHIN AN ADJACENT SEAWARD BIOLOGICAL INFLUENCE ZONE.

It is unlawful for any person [to take king crab or do other acts] . . . in violation of sec. 010(b) of this chapter.

5 AAC 34.610. FISHING SEASONS. King crab may be taken as follows:

(1) from 12:00 noon, September 15 through February 15 or until closed by emergency order, king crab 6-1/2 inches (165 mm) or greater in width of shell may be taken or possessed;

(2) during periods to be opened and closed by emergency order, king crab 7-1/2 inches (191 mm) or greater in width of shell may be taken or possessed.

5 AAC 34.091. [No such regulation in 1976.]

5AAC 34.610. FISHING SEASONS. king crab may be taken or possessed from 12:00 noon November 1 through February 15 unless the registration area is closed earlier by emergency order.